81-2145

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In the Supreme Court of the United States

October Term, 1982

No.

UNITED STATES OF AMERICA,
Respondents

v.

WAYNE ARRANDALE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Certiorari should be granted to determine whether the decision of the Court of Appeals for the Third Circuit is in conflict with the decision of this court in *Kotteakos v. United States*, in that evidence at trial proved the existence of multiple conspiracies yet the indictment alleged a single conspiracy.

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REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

OPINION OF THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

The opinion of the Honorable Donald E. Ziegler, made orally in response to Petitioner's motion for judgment of acquittal is contained in relevant parts in the appendix hereto.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

The Third Circuit, at No. 81-1742, in a judgment order issued February 12, 1982, affirmed the judgment of the District Court. This order is contained in the appendix hereto.

On March 18, 1982, the Third Circuit denied Petitioner's timely request for rehearing en banc.

JURISDICTION

Jurisdiction of this Court to review the determination of the Court of Appeals is given by 28 U.S.C. §1254(1). This petition is being made by the Defendant in the cause below, a party to the said action.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be . . . deprived of life, liberty or property, without due process of law, ...

STATEMENT OF THE CASE

A. Procedural History

On May 13, 1980, Petitioner Wayne Arrandale was charged in one count of a twenty-four count indictment. Petitioner was one of twenty indicted alleged co-conspirators all of whom, according to the government, were involved in a massive single conspiracy to import and distribute large quantities of marijuana from the winter of 1975 to the fall of 1979. There were many unindicted conspirators.

Petitioner Arrandale was charged only in count one of the indictment, conspiracy (21 U.S.C. §§846 and 963). Specific overt acts alleged to have been committed by the Petitioner are found in paragraphs 84, 85, 96 and 98 of the "overt acts" section of the indictment, out of a total of 110 overt acts. These acts allegedly occurred in the summer of 1978. Petitioner's name is not mentioned again in the remainder of the forty-three page indictment.

On February 24, 1981, the jury returned a verdict finding the Petitioner guilty of count one. On April 2, 1981, the Petitioner was sentenced by the court to a period of two years imprisonment and directed to pay a fine of $15,000.00. On April 10, 1981, a timely notice of an appeal was filed by the Petitioner.

B. Facts

The indictment in this case alleges the existence of one massive five year long conspiracy to import and distribute large quantities of marijuana throughout the country. It alleges that 20 indicted co-conspirators and an unspecified number of other known and unknown unindicted others were inextricably involved in this *single* conspiracy performing various necessary functions. It further alleges that Thomas Long was the main man in this conspiracy and that Wayne Arrandale, the Petitioner herein, was one of Long's "Chief Lieutenants".

The evidence adduced by the government at trial however, was substantially different. It was not until more than halfway through the testimony that a witness even mentions the name of Petitioner Wayne Arrandale. That witness testified that he went to New York City from Florida on the instructions of Thomas Long to pick up $100,000 from Petitioner Arrandale that was owed for marijuana. When this witness arrived in New York, he received the money from Petitioner or his brother. Further there was testimony from this witness that Petitioner's brother returned some marijuana to the witness which Petitioner's brother claimed was no good. Throughout the rest of the government's witnesses, Petitioner's name was never again mentioned. In fact, none of the other witnesses had even heard of him.

There was, however, considerable other testimony. This included testimony of various marijuana transactions all over the East and South from 1975 until 1979. The various marijuana deals involved pick ups and deliveries, the use of trucks, rented mobile homes and airplanes. Some deals involved Thomas Long, the so-called "hub" and some did not. There was even testimony of one witness of a plane landing in a jungle airstrip in South America and picking up tons of marijuana and the returning to the United States below radar detection.

Petitioner was not alleged to be a direct part of any of this. During the five year period that this so-called "single" conspiracy lasted, Petitioner's only involvement was in August of 1978. The conspiracy began 3½ years before he is mentioned and lasted another 1½ years thereafter. The only common thread running between and among the various transactions is marijuana. Not even Thomas Long is involved in all of them.

Despite this minimal involvement, the indictment nevertheless refers to Petitioner as a "Chief Lieutenant".

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *KOTTEAKOS V. UNITED STATES*, IN THAT EVIDENCE AT TRIAL PROVED THE EXISTENCE OF MULTIPLE CONSPIRACIES YET THE INDICTMENT ALLEGED A SINGLE CONSPIRACY

In Petitioner's pre-trial motions to sever and to dismiss and in its motion for judgment of acquittal, Petitioner continuously asserted that proof was being offered by the government of multiple conspiracies rather than the single massive conspiracy alleged by the government in the indictment. Petitioner herein contends that he was not part of a single conspiracy as charged in the indictment and that he was substantially prejudiced by the "spill-over effect" which inevitably occurred as a result of all of the evidence of wrongdoing, essentially unrelated to him, about which the jury heard.

Petitioner contends the government's evidence at trial proved the existence of several conspiracies, resulting in a variance which substantially prejudiced his rights and requires reversal. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946).

This Court in *Kotteakos* held that proof of multiple conspiracies under an indictment alleging a single conspiracy constituted a material variance requiring reversal where a defendant's substantial rights had been affected. As this court in *Kotteakos* saw it, the issue was "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." 328 U.S. at 775, 66 S.Ct. at 1253.

Kotteakos, therefore, protects against the "spill-over effect", the transference of guilt from members of one conspiracy to members of another. See also, *United States v. Bertolotti*, 529 F.2d 149, 156 (2d Cir. 1975).

In the instant matter, while Petitioner was technically tried alone, the testimony made reference to about two dozen other persons and scores of drug transactions in which it was not even alleged that Petitioner played a part. Petitioner contends, therefore, that while technically tried alone, he was clearly tried *"en masse"* within the meaning of the *Kotteakos* holding.

In *Kotteakos, supra,* the indictment charged a conspiracy involving 32 persons. The key figure in the scheme was Brown, who was involved in the obtaining of government loans by making fraudulent representation. The evidence at trial, however, showed that there were eight separate conspiracies and that while Brown was a common element to all eight of these and while each conspiracy had similar illegal objects, none really depended on the success of the others.

The facts led the court to speak of a "wheel conspiracy", in which Brown, the "hub" of the wheel, was accused of conspiring with several others, the "spokes" of the wheel. The court in *Kotteakos,* however, found this design to be insufficient in that it was "without the rim of the wheel to enclose the spokes." *Kotteakos,* 328 U.S. at 755.

The instant case, Petitioner contends, is controlled by this Court's holding in *Kotteakos.* As such, Petitioner respectfully urges this Court to grant Certiorari in order to resolve the conflict created by the Third Circuit's decision affirming Petitioner's conviction.

Petitioner herein contends that the prejudice he suffered in the instant trial was as great or greater than that suffered by the defendants in *Kotteakos* and *Bertolotti.*

First of all, the length of the alleged single conspiracy in the instant case, almost *five years,* is far greater than the time involved in either *Kotteakos* or *Bertolotti.* And while *Kotteakos* involved 32 indictees and *Bertolotti* involved 29, the immunized witnesses and the unindicted known and unknown conspirators in the instant case clearly bring the numbers involved to par with the other two cases cited.

In the instant case, one hundred and ten (110) separate overt acts are alleged, almost ten times the number in *Bertolotti*. It should also be noted that while the Petitioner was mentioned in four overt acts, evidence was only adduced, which if believed, proved one or perhaps two of these. In addition, the indictment contains 23 substantive counts and the Petitioner is named in none.

Petitioner Arrandale's minor alleged activity occurred in a two or three month period in the summer of 1978. The "single" conspiracy, according to the government, began three years earlier, before he was even mentioned, and lasted for more than a year afterward. His connection to the testimony involved only knowing or meeting only *one* of the other indicted co-conspirators, Thomas Long, the comparable figure to Brown in *Kotteakos*.

At trial, more than the eight separate conspiracies, as was the case in *Kotteakos*, were raised. These included many separate drug deals between Aiken and Wolfe and Shultze in 1976 and 1977, between Siegel and Shultze in 1975 and 1976, between Aiken, Wolfe and Bauer in 1977, between Bauer and Trop in early 1978, numerous deals between Shultze and Long over a period of years, between Bauer and Long, between Bauer, Begnigni and Long, between Long, Ospina-Montoya and other Columbians, and many more. In *Bertolotti*, the Fifth Circuit case, four separate conspiracies warranted reversal.

Unlike the facts of *Kotteakos*, Thomas Long (the supposed hub) was not even involved in all of the drug deals. According to the testimony of government witnesses Shultze and Bauer, they both worked for Siegel or Aiken and Wolfe or Trop before they had any connection with Long. Yet testimony about scores of transactions, in which Petitioner Arrandale had absolutely no connection, was heard throughout the trial.

The evidence regarding Petitioner Arrandale that was adduced at trial indicated that in the summer of 1978 he gave $100,000 to Long's man Bauer that, according to what Long

told Bauer, was for marijuana. In addition, Petitioner's brother, Glenn, returned some marijuana to Long around the same time—a transaction which Wayne may or may not have had anything to do with. See *facts, infra.*

It was never established when the marijuana that Petitioner allegedly was paying for was delivered to him or if and how it was delivered to him. It was never established where it came from or if the transaction (about which there was absolutely no testimony) was in any way related to any of the other transactions or any of the other co-defendants.

In fact, there was no testimony adduced at trial that Petitioner Arrandale even knew any of the 18 co-conspirators aside from Thomas Long. And the only actual contact he had with Long was helping him move to his new home in Tequesta, Florida.

Paragraph six of the indictment calls Arrandale, the Petitioner herein, a "Chief Lieutenant" of Long's, along with five others. The evidence, however, does not indicate that he even knew these five others or was connected with them in any way.

But nonetheless, at the trial in this matter, the jury that ultimately convicted the Petitioner heard evidence of many, many unrelated drug deals involving dozens of persons over a five year period. They heard of airplanes landing on remote jungle landing strips in South America, and dozens of Columbians loading the plane with tons of marijuana a year or more before Petitioner was even mentioned. They heard of cars, trucks and mobile homes driving marijuana all over the country in transactions totally unrelated and unconnected to Petitioner.

As the court in *Bertolotti* held,

> No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed. (*Bertolotti*, 529 U.S. at 158)

The proof was simply not there to substantiate the claim, alleged in the indictment, of a number of interrelated people all working at various levels to carry out one single conspiracy. As such, the conviction of Petitioner should be reversed. As such the decision of the Third Circuit affirming Petitioner's conviction, albeit by judgment order, is erroneous and fails to conform to the decisions of this Court. As such, Certiorari should be granted to resolve the conflict.

Respectfully submitted,

CARL MAX JANAVITZ
PAUL D. BOAS
Attorneys for Petitioner

Appendix

APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

WAYNE ARRANDALE,

Defendant

Criminal No. 80-89

TRANSCRIPT OF PROCEEDINGS

Transcript of Jury Trial beginning February 17, 1981, United States District Court, Pittsburgh, Pennsylvania, before Honorable Donald E. Ziegler, District Judge.

APPEARANCES:

On behalf of the Government:

Charles Sheehy, Assistant United States Attorney
William Ward, Assistant United States Attorney

On behalf of the Defendant:

Edward Galison, Esquire
Charles Chassen, Esquire

Volume I
February 17 and 18, 1981

Marilyn G. Brown
Official Reporter

THE COURT: Thank you, sir.

I have two rulings which I am required to make, because, as I understand it, under the directives of the Court of Appeals, one, the record must reflect that the Court has made a decision pursuant to United States vs. Continental that the government has established by a preponderance of the evidence that the defendant was a member of a conspiracy knowingly and intentionally. Once the Court makes that decision, then, of course, the jury may consider the statements of co-conspirators against the defendant; and I am satisfied that the government has met its burden of proving by a preponderance of the evidence that Wayne Arrandale was a member of a conspiracy to import marihuana from a foreign nation, and therefore the statements of the co-conspirators would be admissable against Mr. Arrandale.

Once we are beyond that difficulty, — and I suggest and find that we are, — the next question is whether or not, viewing the evidence in the light most favorable to the government, — as you have indicated, Mr. Galison, — there is sufficient evidence to meet the test which is required when a motion for judgment of acquittal is made.

There is evidence of record that, if believed, Mr. Arrandale appeared at a home in Tequesta, Florida, approximately one week after Mr. Long moved in; that he paid to Mr. Long, as I recall, approximately eighty to one hundred thousand dollars; that Long stated that that was pursuant to a prearranged marihuana transaction; further, that Mr. Arrandale owed him additional funds for other marihuana transactions within the time period covered by this conspiracy, and that a man by the name of Bauer was sent to New York as a collector, and that Mr. Arrandale appeared and made some statements which, if believed, would indicate that he was a member of that conspiracy; and further that he, as I recall, paid approximately a hundred thousand dollars.

Now I will admit to you that on cross examination you made some headway with respect to Bauer, and the jury may

indeed conclude, as you have urged, that the defendant should be found not guilty.

However, that is not the test at this point which I am permitted to apply. I must view the evidence in the light most favorable to the government, and I conclude that the government has met that test and that your motion must be denied.

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1742

UNITED STATES OF AMERICA

v.

THOMAS E. LONG, RICHARD WOLFE, DAVID AIKEN, JOSEPH COLUCCI a/k/a Jose, JOSEPH SIEGEL, WILLIAM TIGNELIA a/k/a Billy T., CARL TROP a/k/a/ Carly, TIM DALE SHAFER a/k/a Timmy, DAVID LANTANZIO a/k/a Jaimey, CHARLES STALNAKER, JOSEPH STELLMACK, HOMER MONTOYA OSPINA, THOMAS MILLER, a/k/a Tucker, MICHAEL MEDJUCK, WAYNE ARRANDALE, GABRIEL RODRIQUEZ CAPA, JIMMY LNU, ANTHONY F. BOWE, THOMAS J. GEORGE a/k/a/ T.J. a/k/a Thomas Quinn

Wayne Arrandale,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA — PITTSBURGH
(D.C. CRIMINAL No. 80-00089-15)

Submitted Under Third Circuit Rule 12(6)
January 14, 1982

Before HUNTER and HIGGINBOTHAM, *Circuit Judges*, and WEINER,*
District Judge

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* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that:

1. the indictment purports to allege one conspiracy, but the government's evidence at trial proved the existence of several separate conspiracies;

2. the lower court erred in permitting the jury to consider the statements of co-conspirators made during the course of the conspiracy in that there was insufficient independent evidence linking appellant to the conspiracy:

3. the lower court erred in failing to dismiss the indictment or grant an evidentiary hearing based upon the two year pre-indictment delay.

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By The Court,

/s/ JAMES HUNTER
James Hunter, III, *Circuit Judge*

Attest:

/s/ M. ELIZABETH FERGUSON
M. Elizabeth Ferguson, Chief Deputy Clerk

Date February 12, 1982

Certified as a true copy and issued in lieu of a formal mandate on March 26, 1982.

TEST: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit